82-479

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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

ROBERT D. ORR,
AS GOVERNOR OF THE STATE
OF INDIANA, *et al.*
Petitioners,

v.

THE BOARD OF SCHOOL COMMISSIONERS
OF THE CITY OF INDIANAPOLIS, *et al.*,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether a duly enacted nondiscriminatory 1974 statute providing a mechanism of cost allocation among the parties to a desegregation remedy, may be ignored by a District Court in 1980 in the absence of any challenge or holding by any court of a constitutional defect in that statute, and the entire cost of metropolitan desegregation placed upon the State of Indiana with specific direction as to how and where to obtain the funds.

2. Whether the decision which is the subject of this Petition was a proper exercise of equitable jurisdiction when the effect of that decision, combined with the earlier substantive decision ordering one way transfer of black students to suburban schools, financially insulates all school corporations and offers no incentive to provide black parents the right to vote in school board elections, to be candidates in school board elections, or to share in the governance of the school system, all basic rights available to resident white parents and all other citizens pursuant to state law.

LIST OF PARTIES

Petitioners for this Writ are Robert D. Orr, as Governor of the State of Indiana; Linley E. Pearson, as Attorney General of the State of Indiana; Harold H. Negley, as Superintendent of Public Instruction of the State of Indiana; the Indiana State Board of Education, a public corporate body; and all additional state officials who had been duly served and joined as party-defendants below. Respondents to this Petition who briefed the issues before the Seventh Circuit are the Metropolitan School Districts of Lawrence, Wayne, Warren and Decatur Townships of Marion County, Indiana; the Board of School Commissioners of the City of Indianapolis, Marion County, Indiana; the United States of America; the Indiana State Teachers Association; and Donny Brurell Buckley and

Alycia Marquese Buckley for themselves and a class of black Indianapolis school children.[1]

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[1] The Metropolitan School Districts of Perry Township and Franklin Township, Marion County, Indiana, did not file a brief in the Seventh Circuit but were parties below and are recipients of funds paid pursuant to the order which is the subject of this Petition.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit (hereafter Seventh Circuit) issued on March 26, 1982, has been reported at 677 F.2d 1185 (7th Cir., 1982). A copy of that opinion has been appended hereto at page A-1. A Petition for Rehearing and Suggestion That It Be Heard En Banc was timely filed and was denied by the Seventh Circuit on June 22, 1982. A copy of the Order is attached hereto at page A-20.

The Seventh Circuit affirmed a judgment of the United States District Court for the Southern District of Indiana (hereafter District Court) issued on July 17, 1981. That decision has not been officially reported, but a copy is appended hereto at page A-21.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1) and Rule 17.1(a) and (c) of the Rules of this Court to review an opinion of the Seventh Circuit which has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision, and which has decided an important, unsettled question of state law by approval of the District Court's opinion which, under the guise of continuing equity jurisdiction, ignored that valid state statute, perpetuating a situation directly in conflict with applicable decisions of this Court.

The denial of the Petition for Rehearing was entered on June 22, 1982. This Petition is timely in that it is filed prior to the expiration of the ninety (90) day period allowed by 28 U.S.C. § 2101(c) and Rule 20.4 of the Rules of this Court.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Tenth Amendment to the Constitution of the United States provides:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively or to the people.

The Indiana Transfer Statute, I.C. 20-8.1-6.5-1 *et seq.*, is appended hereto at page A-65.

STATEMENT OF THE CASE

In May, 1968, the United States brought suit against the Board of School Commissioners of the Indianapolis Public Schools (hereafter I.P.S.), its members and its superintendent, charging that the Board was operating a segregated school system. Subsequently, the District Court found I.P.S. guilty of *de jure* segregation. 332 F. Supp. 655 (S.D. Ind., 1971), *aff'd.* 474 F.2d 81 (7th Cir., 1973), *cert. denied*, 413 U.S. 920 (1973).

Following the District Court's 1971 opinion, two black children intervened in the case and filed a class action complaint and an amended complaint which named the State and numerous school districts as added defendants. After various trials and appeals[2], the District Court found the added Defendants Housing Authority of the City of Indianapolis (hereafter HACI) and the State guilty of inhibiting the desegregation of I.P.S.; found the State prohibited the desegregation due to passage of limited consolidated city-county government, I.C. 36-3-1-1 *et seq.* (Uni-Gov); and ordered an interdistrict remedy. 456 F.Supp. 183 (S.D. Ind., 1978), *aff'd.*, 637 F.2d 1101 (7th Cir., 1980), *cert. denied*, 101 S.Ct. 114 (1980).

After that remedy was in place, three suburban schools which were receiving students from I.P.S., petitioned the

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[2] Intervening decisions by the various courts in this case are as follows: 368 F.Supp. 1191 (S.D. Ind., 1973), *aff'd in part, reversed in part, and remanded*, 503 F.2d 68 (7th Cir., 1974), *cert. denied* 421 U.S. 929 (1975); 419 F.Supp. 183 (S.D. Ind., 1975), *aff'd.* 541 F.2d 1211 (7th Cir., 1976), *vacated and remanded*, 429 U.S. 1068 (1977), 573 F.2d 400 (7th Cir., 1978) [following remand by this Court].

District Court to assess all costs of the interdistrict remedy against the State. The District Court granted that Petition, and this review commenced.

Facts Material to the Consideration of the Questions Presented

In early 1974, at the behest of the District Court in its 1973 opinion, 368 F.Supp., at 1224-1227, the Indiana General Assembly enacted the Transfer Statute. That statute has never been challenged in court, but has on several occasions prior to the implementation of the remedy been found applicable to this case by both the District Court and the Seventh Circuit; see 419 F.Supp., at 183; 456 F.Supp., at 191; 503 F.2d, at 74; 637 F.2d, at 1112.

REASONS FOR ALLOWANCE OF THE WRIT

I.

A Valid Statute of the State of Indiana Should be Given Deferrence by the District Court

In 1973, the District Court reaffirmed its original findings against I.P.S. 332 F.Supp 655; found the State committed acts of *de jure* segregation by approving the site selection of three I.P.S. high schools and committed an "omission tending to inhibit desegregation" of I.P.S.; and ordered a one-way transfer of black students from I.P.S. to twenty-four surrounding school corporations. 368 F.Supp. 1191, 1203, 1209. In December of that year, the Court issued a supplementary opinion in which, *inter alia*, it challenged the Indiana General Assembly to provide a mechanism to remedy the segregation in I.P.S., 368 F.Supp., at 1224-1227. At its next regular session commencing in January, 1974, the General Assembly enacted the Transfer Statute which provides that if three (3) basic findings are made then payment provisions become applicable. I.C. 20-8.1-6.5-1 and I.C. 20-8.1-6.5-3, Appendix p. A-65, A-66.[3]

In 1975, the District Court specifically found the elements necessary for application of the Transfer Statute. 419 F.Supp., at 184. Those findings were reaffirmed on two subsequent occasions: an unpublished opinion dated June 2, 1978 A-54, and at 456 F. Supp., at 191. They were never challenged or vacated in any of the numerous appeals in this case.

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[3] Stated briefly, if the above findings are made, the Transfer Statute provides that the State of Indiana will voluntarily pay half the cost of transportation necessitated by any remedy. The statute goes on to allocate other costs between and among the parties, assuring that the costs are met by providing advances from future state distributions if those are necessary, IC 20-8.1-6.5-4(2), or through loans or grants from state funds, IC 20-8.1-6.5-4(1) and (3). A-67.

In those previous opinions, the District Court was quite laudatory of the purpose of the Transfer Statute:

> Specifically, the statute provides a means and method whereby a transferor school corporation may pay a transferee school corporation for the cost of education of a pupil transferred from the one to the other in compliance with a court order issued under the following conditions... 419 F.Supp. 180, at 183 (1975).
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> • • •
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> In its Supplemental Memorandum of Decision dated December 6, 1978, 368 F.Supp. 1191 beginning at 1223, *this Court recognized both the right and the duty of the General Assembly of Indiana to legislate with a view toward assisting in the process of desegregation...* indeed, the General Assembly was encouraged to come up with a workable solution of its own.
>
> Shortly thereafter, during its 1974 session, *the General Assembly acted promptly upon this Court's suggestion,... and provided a workable method of reimbursement to the transferee corporations...*
>
> ...The statute represents purely and simply a State enacted remedial measure, *which the General Assembly had undoubted power to enact.* (unpublished opinion, June, 1978, emphasis supplied). A-52, A-53.

The Seventh Circuit has likewise discussed the purpose and relevance of the Transfer Statute. 503 F.2d, at 74 (7th Cir. 1974); 637 F.2d, at 1112 (7th Cir. 1980).

Nevertheless, after the liability and remedy portions of this case had been finally concluded, including denial of petitions for writs of certiorari, both the District Court and the Seventh Circuit denied the applicability of the Transfer Statute to pay for the costs of the desegregation of I.P.S., and prevented its implementation.

The situation arose in June, 1981, when three suburban school corporations[4] which were receiving black students from I.P.S. petitioned the District Court to have all costs of the interdistrict remedy imposed upon the State. Following a hearing, the District Court granted the petition, and stated that:

> ... To use this Indiana Transfer Act to assess the cost of desegregation would ignore the nature and cause of the constitutional violations found by the Court and would impose the burden of these costs on I.P.S. despite the Court's finding, affirmed by the Seventh Circuit, that the acts of segregation by I.P.S. did not cause interdistrict segregation. A-40.

In a divided opinion, the Seventh Circuit affirmed the District Court. 677 F.2d 1185. Speaking for the majority, Judge Swygert incorrectly stated that only the State has been found liable for interdistrict violations. 677 F.2d. at 1186 and 1187. That statement ignores the fact that the HACI was also found liable, 456 F.Supp. 188, plus the underlying fact that IPS was found guilty of *de jure* segregation against the black students now being transferred out of I.P.S. before the State was ever a party to this case. 332 F.Supp. 655.

The result of these holdings is that the State is to pay the entire cost of metropolitan desegregation[5].

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[4] The Metropolitan School Districts of Lawrence, Warren, and Wayne Townships of Marion County, Indiana.

[5] These costs can be summarized as follows:

1. The full amount of the difference between the average cost of education of a student in I.P.S., and the cost of educating a child in the respective transferee school corporations for all students subject to the transfer order. A-30.

2. The full cost of transportation, both regular and extra-curricular, for all students transferred from I.P.S to the township schools. A-30.

Not only did the District Court order the State to pay the entire cost of the metropolitan remedy, but it also specifically directed the source of funds to be used for those costs. A-33. ¶6. The Order provides that the State must comply by using "unappropriated surplus", and if that is insufficient, the amount must come from a source other than the state education appropriation[4]. Since no unappropriated surplus exists, state officials must make payment from sums authorized by the General Assembly for mental health, corrections, welfare or other state services, a restriction on discretion not utilized against a common defendant.

Petitioners would submit that the State, pursuant to the Tenth Amendment to the Constitution of the United States of America and common principles of federalism, has the inherent authority to structure its own finances. *San Antonio Independent School District v. Rodriquez*, 411 U.S. 1 (1973); *Thompson v. Union Pacific R. R. Co.* 76 U.S. (9 Wall.) 579, 591 (1870).

In this case, the General Assembly passed a statutory series in 1974 designed to facilitate any eventual remedy entered by any court. Indeed, seven (7) years before cross-district busing became a reality, the General Assembly had

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3. The full cost of unspecified "other costs of desegregation." (Order, A-31.

4. The full cost of an artificially generated figure reputed to be the added overhead of I.P.S. due to the loss of approximately 5,500 pupils. (A-31).

Those costs were assessed even though the enrollment of I.P.S. decreased from 108,299 students in 1968 (the year in which the Justice Department filed suit against I.P.S.) to 62,894 students in 1981 (the year the remedy stage of this case was implemented). That decrease amounts to an average of over 3,243 fewer students per year in I.P.S. schools for thirteen straight years.

[4] This appropriation was $976,000,000 for fiscal 1981. A-41.

recognized the possibility of the eventual result and acted promptly, not to obstruct desegregation, but to provide a vehicle to ensure the orderly application of any judgment in a manner which provided payment of all necessary costs.

The authority of the State is present whether the Transfer Statute is viewed as an explicit taxing mechanism as in *Evans v. Buchanan*, (3d Cir., 1978) 582 F.2d 750, or as a less formal allocation of the financial burden. As long as the statutory series has been duly enacted by the Indiana General Assembly it is entitled to application absent some independent constitutional infirmity.

As Judge Posner noted in dissent in the Seventh Circuit:

> My contention that the financing issue ought to be left to the state to resolve derives from the nature of our federal system, which implies that interventions by federal courts into the processes of state government ought to be minimized, but more simply from traditional notions of equity jurisprudence. The end of an equity suit is an injunction, or if the injunction is not obeyed a contempt proceeding; it is not an inquiry into who will bear the costs of the injunction. Suppose a company was found to have violated Title VII of the Civil Rights Act of 1964 by paying its black workers less than its white workers, and an injunction forbidding the discrimination was entered. No one would ask where the company was going to get the money to pay higher wages to its black workers (presumably the market would not let it just lower the whites' wages to the blacks' level) — whether it was going to raise prices and reduce output, or use more labor-saving machinery and reduce its work force, or reduce dividends, or what have you. These are fascinating questions for economists, but too difficult and tangential to engage the attention of courts, as the Supreme Court has held in dealing with comparable

> issues of "incidence" in the antitrust field. See *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 732, 741-422, 97 S.Ct. 2061, 2067, 2072, 52 L.Ed.2d 707 (1977). Only if the company attempted to comply with the injunction by committing a fresh act of discrimination, as by firing its black workers, would the question of how the costs of the injunction were being defrayed come before the court that had issued the injunction. I do not see why the result should be different in this case. A defendant that happens to be a state of the United States is entitled to as much consideration as a private corporation.

677 F.2d at 1191-1192.

In *Milliken v. Bradley*, 433 U.S. 267, 291 (1977) this Court affirmed a decision which imposed half the cost of desegregation on the state and the other half on the offending school corporation, but rejected Michigan's Tenth Amendment arguments, stating:

> ...The District Court has neither attempted to restructure local governmental entities nor to mandate a particular method or structure of state or local financing. Cf. *San Antonio Independent School Dist. v. Rodriquez*, 411 U.S. 1, (1973). The District Court has, rather, properly enforced the guarantees of the Fourteenth Amendment... in a manner that does not jeopardize the integrity of the structure or functions of state... government.

Here, the District Court did precisely what this Court found lacking in *Milliken*. The crucial differences between *Milliken* and this case are that Michigan had no statute allocating desegregation costs[7], and the fact that the District Court specified the source of the funds. Thus, the

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[7] Indeed, *no* reported desegregation/finance case considered the applicability of a state statute specifically designed to deal with desegregation expenses.

Tenth Amendment is clearly applicable.

The outcome in this case is also anomalous because the moving parties before the District Court were suburban school systems which are all subordinate public entities created by Indiana law. In addition to the impropriety of the result reached as discussed above, the federal judiciary has intruded upon a disagreement between a state and its political subdivisions. Petitioners would submit that political subdivisions do not have standing to mount a direct challenge to a state statute, *Williams v. Mayor and City Council of Baltimore*, 289 U.S. 36, 40, (1933), *Pawhuska v. Pawhuska Oil and Gas Co.*, 250 U.S. 394, 398, (1919), *City of New Orleans v. New Orleans Water-Works Co.*, 142 U.S. 79, (1891)[8]

II.

The Order Perpetuates a Patently Illegal Situation and Rewards Parties Who Directly Participated in the Original Violation

The substantive desegregation decree for Marion County, Indiana after some fourteen (14) years of litigation consisted of the creation of geographical areas within Indianapolis from which black students are sent to selected suburban schools. In some cases, the black students are from contiguous areas while in other cases, they are transported from areas far across the city. No white students are transported.

The initial effect of the Order which gave rise to this Petition is that the District Court and the Seventh Circuit financially insulated all parties to this action from payment

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[8] A lack of standing is a lack of subject matter jurisdiction, which, pursuant to Rule 12(h)(3) of the Federal Rules of Civil Procedure, may be raised at any time. *Association of Data Processing Service Organization, Inc. v. Camp*, (8th Cir., 1969) 406 F.2d. 837; *Reeves v. International Telephone and Telegraph Corp.*, (5th Cir., 1980) 616 F.2d. 1342.

except for the State of Indiana. However, the final result of this judicially created financing mechanism is that there is no incentive for any of the parties to explore alternative desegregation plans or to modify what is a patently flawed final substantive decree. This means that black parents in the transferring areas will continue to pay property taxes to I.P.S., a school system their children do not and will never again attend; those parents will never be allowed to be candidates for school board membership in the suburban school systems now charged with educating their children; and they will not be able to vote for school board members in the suburban schools systems. This result is somewhat amazing given this Court's controlling precedents[9] and the fact that this litigation commenced in 1968 presumably to vindicate the rights of the black population of Indianapolis.

It should also be noted that both the District Court and the Seventh Circuit ignored not only the liability of HACI, but awarded, as proper equitable relief, state funds to the respondent suburban school districts which bore primary responsibility for the alleged "state violation" which necessitated the metropolitan remedy. In brief summary, state liability was based upon the passage in 1969 of a governmental reorganization series commonly known as Uni-Gov[10]. Uni-Gov provided for the consolidation of certain functions of Marion County government with a number of significant exceptions, fire protection, police, garbage collection, to name but a few. Education was one of the exceptions. None of the suburban school districts

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[9] See the result reached by this Court in *Kramer v. Union Free School Dist.*, 395 U.S. 621, 89 S.Ct. 1886 (1969), and *Reynolds v. Sims*, 377 U.S. 533, 84 S.Ct. 1362 (1968). No modern precedent from this Court countenances the denial of substantive rights to blacks by the federal judiciary under the guise of equitable jurisdiction.

[10] Uni-Gov was passed some nine (9) months after this case commenced and became effective one year and seven months from that date.

clamored to go out of business, and, as Judge Posner noted in dissent:

> ... Now no one, I take it, thinks that the reason why IPS's boundaries were not expanded to embrace the whole of Marion County was that the voters of South Bend or Fort Wayne or Evansville, who will share the cost of the busing decree under the order affirmed today, wanted the public schools of suburban Marion County to remain white. The schools exception to Uni-Gov was procured by the legislators elected by the people of suburban Marion County. This is not only obvious but was found as a fact by the district court in this litigation.
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> The "Mayor [of Indianapolis], testifying as a witness, gave no educational or governmental reason for excluding the [suburban] schools from the reach of Uni-Gov. He simply (and no doubt accurately) stated that the Uni-Gov bill would not have passed had the schools been included. The inference is that the representatives elected by the vote of suburban residents—many of whom had recently moved to the suburbs from the central city to escape the threat of desegregation posed by the filing of this very suit in 1968—would have voted against Uni-Gov but for exclusion of the schools." *United States v. Board of School Comm'rs*, 456 F.Supp. 183, 187 (S.D. Ind. 1978).
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> Thus, so far as segregation between school districts is concerned, which is all that is before us in this appeal, it is the residents of the white suburbs of Marion County who are the primary wrongdoers, as a matter of equity if not of law, for there would be no need for an interdistrict busing order without the schools exception in Uni-Gov and there would be no schools exception but for the actions of the white voters of suburban Marion County. As the district court stated in another of its opinions in this litigation, "the

> suburban Marion County units of government... have consistently resisted the movement of black citizens or black pupils into their territory. They have resisted school consolidation, they resisted civil annexation so long as civil annexation carried school annexation with it, they ceased resisting civil annexation only when the Uni-Gov Act made it clear that the schools would not be involved. Suburban Marion County has resisted the erection of public housing projects outside IPS territory, suburban Marion County officials have refused to cooperate with HUD on the location of such projects, and the customs and usages of both the officials and inhabitants of such areas has been to discourage blacks from seeking to purchase or rent homes therein...." *United States v. Board of School Comm'rs*, 419 F.Supp. 180, 182- 83 (S.D. Ind. 1975). 677 F. 2d at 1193

Petitioners would submit that it is not within the proper exercise of equity jurisdiction to award to a primary wrongdoer, upon that wrongdoer's own petition, state funds in a manner at distinct variance with both state statutory law and decisional law from this Court.

CONCLUSION

For these reasons, a writ of certiorari should be issued to review the decision of the Seventh Circuit.

Respectfully submitted,

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